

O P I N I O N2
by City attorney Anderson

August 24, 1970

Honorable Mayor and
 Members of the City Council
 City Hall
 Berkeley, California

PRESENTED TO COUNCIL
 CITY OF BERKELEY

*Police Admin -- A -- Berkeley
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OFFICE OF
 CITY CLERK

VALIDITY OF PROPOSED CHARTER AMENDMENT PROVIDING
 THE ESTABLISHMENT OF THREE INDEPENDENT AND
 SEPARATE POLICE DEPARTMENTS IN THE CITY OF BERKELEY

There has been submitted by petition a proposed amendment to the Charter of the City of Berkeley which would establish three independent and separate police departments in the city, each to be governed by a separate neighborhood council or councils. It has been determined that there are a sufficient number of signatures on the petition to qualify the proposed Charter Amendment for submission to the electorate. You have requested my opinion concerning the validity of the proposed Charter Amendment.

It is my opinion that the proposed Charter Amendment is invalid.

1. The proposed Charter Amendment would purport to establish three police departments -- one in each of three specified geographical areas of the City. Each of these police departments would be administered by a commissioner or commission selected by a neighborhood or division council or councils. Two of the three departments are subdivided into two divisions and each division would have its own elected council; each council would select a commissioner and presumably it is intended that the departments with two divisions shall be administered by the two commissioners acting jointly as a commission.

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The commissioner is authorized to fix the compensation for all employees of the department (it is not indicated how such compensation shall be fixed in those departments in which there are two divisions and two commissioners). The compensation of the police commissioner is to be fixed by the respective division councils.

It is provided that "Funds for the Departments shall be appropriated annually for the City of Berkeley by the City Council and shall be disbursed to each Department on the basis of the number of people residing in each Department District on the last preceding election."

It is presumably intended that the commissioners and councils shall have complete governing authority over the municipal police function, but that the City Council shall be obligated to provide funds for the performance of such function without having any control whatsoever over the manner in which or the extent to which the municipal police function shall be performed.

Section 38 of the Charter provides that "The Council shall be the governing body of the municipality." The proposed Charter Amendment is in direct conflict with this provision, and since Section 38 is not proposed to be amended or repealed, such conflict is irreconcilable. There is no authority in California for a municipal corporation to have more than one governing body.

As amended in June, 1970, Article XI, Section 5(a), of the State Constitution provides that:

(a) It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall

supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

(b) It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: (1) the constitution, regulation, and government of the city police force (2) subgovernment in all or part of a city (3) conduct of city elections and (4) plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and for their compensation, and for the number of deputies, clerks and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees.

Under these constitutional provisions, a charter city may provide for the government of its police department through its governing body without interference from the state legislature. It may also provide for subgovernment in all or part of the city. Subgovernment by its very name is that government which is subordinate to the main city government, namely, the City Council as the governing body of the City.

Since the Council is charged with the duty and responsibility of governing the city and is required to provide the necessary funds therefor, any provision which would purport to authorize another body or bodies to govern without any financial or other control whatsoever in the City Council would be invalid.

2. The proposed method of selection of the division councils is unconstitutional as a denial of the equal protection of the laws.

The City of Berkeley is one municipal corporation, and under the several recent decisions of the U. S. Supreme Court and the California Supreme Court which have established the one man-one vote rule, the division of the city into geographical areas without regard to population to provide for election of council members is invalid.

The Charter Amendment would require election of division or neighborhood councilmen solely on the basis of geography. It is true that within each department there is provision for establishment of precincts on the basis of population; however, population is not used as the basis for the division of the city into three departments nor even to the division of the two departments which are divided into two divisions.

See Westbrook v. Mihaly (1970), 2 C. 3d 765.

3. The proposed Charter Amendment is so vague, ambiguous and uncertain as to be unenforceable and therefore is invalid.

The Charter Amendment which has been submitted is so poorly drawn that it would appear to be incapable of effectuation. Following are a few of the defects which have been noted:

a. It is not possible to ascertain from the proposed Article XVII what the police commission is. In one place it is stated that "each department of police shall be administered by a Commission (or Commissioner)". In another place it is provided that "The Police Commission shall hold regular public meetings at a time when the residents of the Department District are most able to attend." Except for the use of the word "The" in the second quoted provision (which would seem to indicate that there is proposed to be only one police commission for the entire city), both quoted statements lead to the conclusion that there would be a police commission in each of those two departments in which there are two divisions and two commissioners. On the other hand reference is made to "the full Commission"; this appears to mean one commission for the entire City.

b. It is not specified how compensation for department employees will be determined in those departments where there are two

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police commissioners.

c. There is no provision for a method to fix the compensation of police councilmen, nor by whom such compensation shall be fixed.

d. There is no provision made for the nomination of police councilmen, nor for the time of holding elections, nor for the beginning and ending dates of their terms.

e. It is provided that funds will be disbursed to each department on the basis of the number of people residing in each Department District on the last preceding election. What election -- state or municipal, general or special, or the last election at which police councilmen were elected?

f. Duties of council as set forth in section 5 purport to be departmentwide in some instances. What happens in department which is divided into two divisions and there are two such councils in the department?

g. Provision for call of special meeting is invalid under Ralph M. Brown Act. What happens in department with two divisions when one council wants to make changes but other does not?

h. Section on recall is so incomplete and uncertain as to be meaningless. Residents? Last preceding general election? Who is to conduct election? What happens with regard to replacement if member is recalled? "Not more than 30 days prior . . .?"

i. Section on recall of commissions is completely meaningless.

j. Section 12 is invalid. Section 44(11) of the Charter

provides that "No ordinance nor section thereof shall be repealed except by ordinance adopted in the manner provided in this section."

DECLARATORY RELIEF

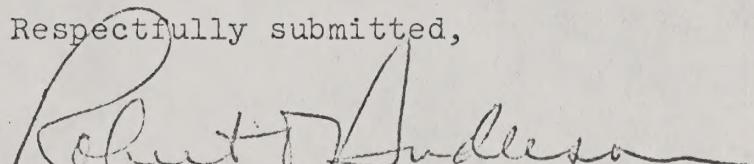
It has been suggested that the City should file an action in declaratory relief seeking a judicial determination of the invalidity of the proposed Charter Amendment. It is my opinion that such an action is not an appropriate or available remedy to the City at this time.

The statute providing for declaratory relief (Sections 1060-1062a of the Code of Civil Procedure of the State of California) has been liberally construed, and the remedy is available in a wide variety of situations. However, there must exist an actual controversy, and declaratory relief may not be awarded where no justiciable controversy exists.

In the instant case, there is no justiciable controversy at the present time because the Council has as yet taken no action with respect to the Charter Amendment (except that the Council has decided that it does not propose to request the Board of Supervisors to place the proposition on the November ballot, and if that matter is to be litigated the action would be instituted by those who contend that such decision by the Council was erroneous). If the Council determines that the Charter Amendment should be presented to the voters in April, there is then no matter to be presented to the court except a request for an advisory opinion, and the declaratory relief statute does not authorize declaratory judgments that are merely advisory. On the other hand if the Council determines that it will not present the Charter Amendment to the electorate, the proponents of the measure

could then bring an action seeking to compel the Council to place it on the ballot. In this latter instance, the question of the validity of the Charter Amendment could be presented to the court by way of defense; as I previously advised you orally, the court might or might not pass upon this question prior to the election.

Respectfully submitted,



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